SUPREME COURT, U. S.
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In The

Supreme Court of the United States

October Term, 1973

73-953

MICHAEL FARR,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Appeal from a Judgment of the United States District Court for the Southern District of New York

REPLY MEMORANDUM OF PETITIONER

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REPLY MEMORANDUM OF PETITIONER MICHAEL FARR

Petitioner Michael Farr submits this brief in reply to the answering memorandum of the Solicitor General. This memorandum is also submitted with reference to the companion certiorari petition filed by the Solicitor General in *United States v. Ralph Feola*, No. 73-1123.

Both Feola and Farr were tried together, along with two other defendants (Alsondo and Rosa), in the United States District Court for the Southern District of New York (Docket No. 72 CR 1372). The appeals of each were argued before different panels of the Second Circuit, as Farr was sentenced three months after Feola. However, the final decisions of both panels of the Court of Appeals was rendered the same day (November 19, 1973). The final results of each panel of the Second Circuit as to both Farr

and Feola (also Alsondo and Rosa) were the same — the conspiracy convictions were reversed, and the substantive convictions were affirmed.

Michael Farr has petitioned this Court for certiorari with respect to his substantive conviction. The Solicitor General has petitioned this Court with respect to the reversal of the conspiracy conviction, solely as to Ralph Feola (Docket No. 73-1123). It should be noted that all of the defendants, including Farr, and not just Feola, secured reversals of their conspiracy conviction. It is just not significant for purposes of appellate review that only Feola escaped a prison sentence as a result of the decisions of the Court of Appeals. Farr and the two other defendants still received prison sentences, for they had been sentenced to concurrent prison sentences by the District Court. However, the concurrent sentence doctrine has been substantially modified by the decision of this Court in *Benton v. Maryland*, 395 U.S. 784 (1969); see also footnote 1, *United States v. Maze*, 94 S.Ct. 645, 647, Docket No. 72-1168, January 8, 1974. As such this Court is free to review this issue as it pertains to all of the defendants, including Michael Farr. (See footnote 2, government petition — Feola, and footnote 3, government answer — Farr.)

The *Farr* opinion is reported at 487 F.2d 1023. The *Feola* opinion is reported at 486 F.2d 1339, *sub nom. United States v. Alsondo, et al.*

The Solicitor General has petitioned for certiorari in *Feola* on the issue of whether in a prosecution for conspiracy to violate a federal law (assault on a federal

agent), it is necessary for the prosecution to establish the knowledge of the defendants of the federal jurisdictional element (knowledge that the assaulted person was in fact a federal agent). In all fairness we cannot deny that the issue posed by the Solicitor General is indeed a substantial question of federal law important to the administration of criminal justice in the federal courts. Nor can we quarrel with the recitation of the Solicitor General as to the conflict of authority among the various circuits. On the other hand we do not concede the merits of the government's argument.

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In *Farr* the Solicitor General has not denied the petitioner's argument that the issue posed in that application is substantial. Of course he cannot do so for that position had initially been taken by the Court of Appeals itself. The government is merely arguing that the Second Circuit eventually decide the question properly, after reaching a contrary position in its initial decision.

In its answering memorandum the Solicitor General concedes that Farr's substantive conviction was based solely on his participation in the conspiracy charged in the indictment (page 2). Of course that conspiracy was later negated by the Court of Appeals on federal jurisdictional principles. The Solicitor General now argues that pursuant to *Pinkerton*, (328 U.S. 640), " A conspiracy punishable under local law", and not just "A federal conspiracy", suffices to sustain a substantive conviction.

At this state of the proceedings it is really not necessary to go into the relevant merits of the government's position and Farr's position. It is obvious it

presents an important issue of law warranting full consideration by this Court, after briefing and oral argument.

It is of interest to note that the issue presented by the government's petition is very much related to the issue presented by Farr's petition. Both relate to important aspects of the federal conspiracy law — the federal jurisdictional element, and whether its absence is fatal to both a conspiracy conviction and a Pinkerton substantive conviction. Both issues relate equally to Farr, Feola and the other two defendants.

We are indeed fortunate that so short and simple a trial should present two profound questions of law. We would suggest that both the petition of the Solicitor General and the petition of Michael Farr be granted.

Respectfully submitted,

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